# STATE OF MICHIGAN

# COURT OF APPEALS

---

GREGORY HAYNES,

Plaintiff-Appellee,

v

MICHAEL J. NESHEWAT, ROBERT J. MURRAY and BRIAN PELTZ,

Defendants,

and

OAKWOOD HEALTHCARE, INC. and OAKWOOD HOSPITAL-SEAWAY CENTER

Defendants-Appellants.

---

UNPUBLISHED
June 23, 2005

No. 249848
Wayne Circuit Court
LC No. 01-137330-NO

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendants, Oakwood Healthcare, Inc. (Oakwood) and Oakwood Hospital-Seaway Center (Seaway), appeal by leave granted from the order granting in part and denying in part their motion for summary disposition regarding plaintiff Gregory Haynes' claims under the public accommodations provision of the Elliott-Larsen Michigan Civil Rights Act (ELCRA), MCL 37.2302(a). We reverse.

I

Plaintiff is an African-American physician licensed in the state of Michigan. He has had clinical privileges and has been a member of the medical staff at Seaway and Oakwood since 1991. In November 2000, Seaway's Medical Executive Committee ("MEC") investigated allegations of unprofessional behavior regarding plaintiff. The MEC found that the charges were substantiated and recommended that plaintiff take various corrective actions requiring him to (1) take fifteen "CME" credits in critical care medicine, (2) complete the Internal Medicine Board Review Course, (3) consult with an intensivist for each admission to the intensive care unit, and (4) undergo an evaluation for anger management. Plaintiff's subsequent internal administrative review was unsuccessful and the MEC's recommendation was affirmed.

In October 2001, plaintiff filed an action against defendants in circuit court alleging tortious interference with business relationships and expectancies, negligence, discrimination under the public accommodations provision of the ELCRA, MCL 37.2302, and civil conspiracy. In January 2003, Oakwood and Seaway moved for summary disposition pursuant to MCR 2.116(C)(4), (C)(7) and (C)(8), arguing, among other things, that the defendant hospital was not a place of public accommodation with regard to its decisions concerning the grant of medical staff privileges.[1] Plaintiff opposed summary disposition, and after hearing arguments, the trial court issued an order denying in part and granting in part defendants' motion. The trial court dismissed plaintiff's tort claims,[2] but denied summary disposition under MCR 2.116(C)(8) with respect to plaintiff's public accommodation and conspiracy claims under the ELCRA on the basis that the defendant institutions were places of public accommodation under the ELCRA's broad statutory language, and that plaintiff had sufficiently pleaded claims of discriminatory treatment in regard to the public accommodations made available by defendants.

Specifically, the trial court, citing by analogy to both *Menkowitz v Pottstown Mem'l Med Center*, 154 F3d 113, 121 (3d Cir 1998) (holding that individual whose hospital privileges had been suspended stated claim for discrimination with respect to privileges of public accommodation under the American with Disabilities Act when similar broad statutory language encompassed plaintiff's claim) and *Communities for Equity v Mich High School Athletic Assn*, 26 F Supp 2d 1001, 1010 (WD Mich 1998) (denying summary disposition of plaintiff's claims under MCL 37.2301 and MCL 37.2302 on the basis that there existed a question of fact as to whether the defendant was a place of public accommodation or a public service), concluded that plaintiff's complaint sufficiently alleged that defendant had engaged in racial discrimination and unlawfully denied him the privilege to practice medicine The trial court further reasoned, in denying defendant's motion for reconsideration, that plaintiff's "staff privileges" fell within the ambit of "privileges" as commonly understood under the statute and that defendants could not prevail because defendants' analysis required a determination that a given institution could be public in some aspects and private in others. Defendants sought leave to appeal, which this Court granted.

II

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. *Corley v Detroit Bd of Educ*, 470 Mich 274, 277; 681 NW2d 342 (2004). All well-pleaded factual allegations must be taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). The motion should be granted only if the plaintiff's

---

[1] Defendants Brian Peltz and Robert Murray were dismissed by stipulation agreement in November 2002. An order of default judgment was entered in June 2002 against defendant Michael Neshewat.

[2] The trial court also denied defendant's motion to set aside the default judgment against defendant Michael Neshewat.

claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Corley*, *supra* at 278.

We review questions of statutory interpretation de novo. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002). In reviewing a statute, "if its language is clear, we conclude that the Legislature must have intended the meaning expressed, and that the statute is enforced as written." *Elezovic v Ford Motor Co*, ___ Mich ___ ; ___ NW2d ___ (2005), slip op at 12.

III

Defendants first argue that the trial court improperly denied their motion for summary disposition because plaintiff failed to state a claim under the public accommodations section of the ELCRA, MCL 37.2302. Defendants contend that a hospital is not a place of public accommodation in regard to its relationship with physicians with staff privileges at the hospital. We agree.

In construing a statute, the primary goal is "to ascertain and give effect to the intent of the Legislature." *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). In construing and applying the ELCRA to particular facts, "the policy behind [the] statute cannot prevail over what the text actually says. The text must prevail." *Elezovic, supra* at 16. Thus, our construction of the ELCRA may not defer to federal court interpretations of Title VII that give consideration to " 'policy' over 'text.' " *Id*. at 17. When a statutory term is not defined, we give the term its plain and ordinary meaning. *Stanton v City of Battle Creek*, 466 Mich 611, 617; 647 NW2d 508 (2002), citing MCL 8.3a; *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999).

Article three of the ELCRA addresses prohibited discrimination by places of public accommodations and services. Pursuant to MCL 37.2301(a), a place of public accommodation is:

> a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, *whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public*. [Emphasis added.]

Thus, health facilities such as defendants' constitute a place of public accommodation when their "goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public." MCL 37.2302(a) states in relevant part:

> Except where permitted by law, a person shall not:
>
> Deny an individual the full and equal enjoyment of the *goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation* . . . because of religion, race, color, national origin, age, sex, or marital status." [Emphasis added.]

MCL 37.2301(b) defines a public service under the CRA as a public facility operated by the state or "a tax-exempt private agency established to provide service to the public."

It is clear under section 301(a) that the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation are only those goods, services, facilities, privileges, advantages, or accommodations which are extended, offered, sold, or otherwise made available to the public; that is, it is the fact that these goods, services, facilities, privileges, advantages, or accommodations are available to the public that renders the facility a place of public accommodation. Conversely and by logical inference from the text, if the goods, services, facilities, privileges, advantages, or accommodations offered by a health facility are not made available to the public, the offering of these things is insufficient to render the facility a place of public accommodation. There is no material dispute on the record that staff medical privileges, whether considered as "privileges" (as the trial court did), "advantages" or "accommodations" within the meaning of the ELCRA, are not made available to the public. Instead, they are the subject of contract between defendants and those physicians meeting specified criteria. Because the text of the ELCRA expresses no intention on the part of the Legislature that the terms "goods, services, facilities, privileges, advantages, or accommodations" should be construed differently or more broadly in section 302(a) than those same terms are construed in section 301(a), we conclude that medical staff privileges, the provision of which would neither qualify defendants as a place of public accommodation under section 301, nor constitute "the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation" under section 302. Accordingly, the trial court erred in denying summary disposition.

We recognize that this Court has treated a hospital as a "place of public accommodation" for purposes of the CRA. See *Whitman v Mercy-Hosp*, 128 Mich App 155, 157-162; 339 NW2d 730 (1983). However, we did so because the hospital had denied the plaintiff access to the delivery room, a place generally open to the general public, on the basis of the plaintiff's marital status. We noted in that case that "[a] 'place of public accommodation' includes a health institution '*whose * * * services are offered * * * or * * * made available to the public*'." *Id.* at 160 (citation omitted and emphasis added). The instant case is distinguishable because, as we noted earlier, plaintiff's claim concerns medical staff privileges not otherwise available to the public. In this context, with regard to contractual relationships with those physicians offered staff privileges by defendants, defendant is not a place of public accommodation because these privileges are not offered or otherwise available to the public.

In this regard, we disagree with plaintiff's contention and the trial court's conclusion that the ELCRA does not contemplate that an institution may be public in some respects while private in others. In *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433, 439; 491 NW2d 545 (1992), our Supreme Court stated:

> Acknowledging that an insurer may be a "[p]lace of public accommodation" within the meaning of that term because it is a "business . . . whose . . . services . . . are extended, offered, sold, or otherwise made available to the public," the gist of Kassab's claim is breach of contract. Because access to insurance coverage was not denied, the majority of the Court is of the opinion that it is beyond the legislative purpose to provide a civil rights action under the public accommodations section of the act for breach of contract in claims processing.

> Upon the issuance of a policy of insurance, the services owed by an insurer to an insured are no longer 'services . . . made available to the public." The rights and obligations of the contracting parties are then private. While an insured is not separated from the "public" upon entering into insuring agreements embodied in a policy of insurance, the obligations of the insurer are owed to a particular contracting party/insured. The rights and obligations of the contracting parties are specific to the contract and to the persons involved. [*Kassab, supra* at 440-441.]

More recently, in *Diamond v Witherspoon*, 265 Mich App 673; ___ NW2d ___ (2005), slip op at 8, this Court noted that "[i]n *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433, 439; 491 NW2d 545 (1992), our Supreme Court concluded that the focus of § 2302 of the CRA, MCL 37.2302, is 'on *denial of access* to a place of public accommodations or public services. (Emphasis in original),' " and that because the complaint in *Kassab* "did not allege denial of access to public accommodations, it was beyond the scope of the CRA to provide redress to plaintiff." *Witherspoon, supra* at 8, citing *Kassab* at 440-441.

Under both *Kassab* and *Witherspoon*, then, whether a cause of action has been sufficiently pleaded under section 302(a) does not depend solely on the single inquiry whether an entity might in certain circumstances fit the definition of a "place of public accommodation." Rather, whether a section 302(a) claim may be established also requires consideration of whether a plaintiff has alleged that he was deprived of access to goods, services, facilities, privileges, advantages, or accommodations that were "otherwise made available to the public." MCL 37.2301.

Because the inquiry whether an entity is a place of public accommodations is dependant on whether the goods, services, facilities, privileges, advantages, or accommodations of that facility were available to the public, the trial court's reliance on *Menkowitz* and *Communities for Equities* is misplaced. *Menkowitz* construed the text of Title III of the Americans with Disabilities Act (ADA) which provides in relevant part:

> (a) General rule.
>
> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. [42 USC 12182(a)].

Under 42 USC 12181(7)(F), "[t]he following private entities are considered public accommodations . . . if the operations of such entities affect commerce --"

* * *

> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, *hospital*, or other service establishment. [Emphasis added.]

Under Title III, a hospital is specifically defined as a place of public accommodation if its operations affect interstate commerce. *Menkowitz, supra* at 116. In *Menkowitz,* the hospital defendant was indisputably a place of public accommodation and the issue there was whether a medical doctor with staff privileges at the hospital could assert a claim that the hospital had engaged in disability discrimination against him as an "individual", as the term "individual" is defined by Title III of the ADA. Under section 301 of the ELCRA, unlike Title III of the ADA, an entity constitutes a place of public accommodation only when it has made its goods, services, facilities privileges, advantages or accommodations available to the public. At issue in the present case is *whether* each defendant becomes a place of public accommodation by providing medical staff privileges to the plaintiff, when these staff privileges are not generally available to the public. Thus, unlike *Menkowitz,* the status of the hospital as a place of public accommodation is in dispute. Because the text of Title III of the ADA and section 301 of the ELCRA define "place of public accommodation" differently, the analysis of Title III of the ADA in *Menkowitz* is necessarily "contrary to the very wording of our [EL]CRA," and we cannot appropriately rely on such interpretation in construing sections 301 and 302 of the ELCRA. *Elezovic, supra* at 17.

IV

On basis of foregoing, we conclude that the trial court erred in denying defendants' motion for summary disposition. The medical staff privileges made available to plaintiff were a matter of private contract between plaintiff and defendants and not "goods, services, facilities, privileges, advantages, or accommodations" by which defendants constitute a place of public accommodation under section 302 of the ELCRA.

Reversed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder